IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISA POKALSKY	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, et al.	:	
	:	
	:	
Defendants.	:	**NO. 02-323**

M E M O R A N D U M

Reed, S.J. **August 28, 2002**

Plaintiff Lisa Pokalsky ("Pokalsky") has brought suit pursuant to 42 U.S.C. § 1983, Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12132, and various state tort theories. Jurisdiction is proper under 28 U.S.C. § 1331, as this case this case raises a federal question. Currently before this Court is the motion of defendant Southeastern Pennsylvania Transportation System ("Septa") to dismiss[1] (Document No. 18) and the motion of King Paratransit Services, Inc. ("King Paratransit") to dismiss (Document No. 19), both of which have been filed pursuant to Federal Rule of Civil Procedure 12(b)(6). Also before this Court is the motion of plaintiff Pokalsky to strike the federal criminal charges alleged by *pro se* defendant David DeSouza (Document No. 26), which has been filed pursuant to Federal Rule of Civil Procedure 12(f). Upon consideration of the motions, responses and replies thereto, and for the reasons which follow, I will grant in part and deny in part the motions of Septa and King Paratransit to dismiss and will grant the motion of plaintiff to strike.

[1] This motion was jointly filed with Richard Evans who has since been voluntarily dismissed as a defendant in this case. (Document No. 32).

II. Background

The following facts are taken from the amended complaint (Doc. No. 6, Am. Compl.) and considered true as required by law. Defendant Septa is a state-created instrumentality that provides public transportation services to individuals in Southeastern Pennsylvania. Septa is required by law to operate a paratransit system which provides rides to disabled patrons. King Paratransit has a contract with Septa to provide paratransit drivers. David DeSouza ("DeSouza") is a former paratransit driver employed by King Paratransit. Pokalsky is a disabled patron accredited for transit services by Septa, who has cerebral palsy and is wheelchair bound.

On September 6, 2000, Pokalsky, who at the time was 30 years old and weighed eighty pounds, was picked up for her scheduled paratransit ride by DeSouza who was working in the course of his regular duties for defendants. Upon Pokalsky entering the vehicle, DeSouza strapped and secured her wheelchair to the floor of the van. While Pokalsky was able to unstrap her seatbelt, she is unable to walk, and without assistance, could not exit the vehicle. DeSouza was scheduled to drive Pokalsky home from a doctor's appointment. He drove past her home, parked the vehicle in a secluded area, lifted her from her wheelchair and raped her. On August 31, 2001, following a jury trial in the Bucks County Court of Common Pleas, DeSouza was convicted and sentenced to twenty to forty years for this rape and related charges.

Neither Septa nor King Paratransit conducted a background check on DeSouza before hiring him. Had such a check been conducted, defendants would have learned that DeSouza had previously been arrested for the alleged rape of a disabled woman. He was not convicted for this alleged rape. As well, prior to the incident of September 6, 2000, defendants had knowledge that a complaint had been made on August 1, 2000, that DeSouza engaged in improper sexual

conduct with another female paratransit rider who is mentally retarded. Neither King Paratransit nor Septa conducted any investigation into this complaint.

II. Legal Standards

Rule 12 (b) of the Federal Rules of Civil Procedure provides that "the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12 (b) (6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969). Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

A motion to dismiss should be granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). In considering a motion to dismiss, the proper inquiry is not whether a plaintiff will ultimately prevail, but rather whether a plaintiff is permitted to offer evidence to support its claims. See Children's Seashore House v. Waldman, 197 F.3d 654, 658 (3d Cir. 1999) (citation omitted). The moving party bears the burden of showing that the non-moving party has failed to state a claim for which relief can be granted. See Gould Elec. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000). While all facts in the complaint must be accepted as true, this Court "need not accept as true unsupported conclusions and unwarranted inferences." Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 184 (3d Cir. 2000), cert. denied, 121 S. Ct. 2000 (2001) (citations omitted).

Rule 12(f) allows a party to file a motion to strike "any redundant, immaterial, impertinent or scandalous matter."

III. Analysis

A. Section 1983

State Actor Requirement

It is well settled that as a threshold matter, in order to state a claim for relief under § 1983, plaintiff must allege that defendants acted under color of state law and deprived her of a right established by the Constitution or the laws of the United States. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997). Both Septa and King Paratransit move to dismiss the amended complaint on the ground that Pokalsky is not able to allege that defendants acted under color of state law because DeSouza was not acting under color of state law. Plaintiff's response addresses the issue of whether DeSouza can be deemed a state actor when he is employed by King Paratransit, a private contractor. Defendants, however, do not move to dismiss on this ground. Rather, defendants argue that DeSouza's conduct cannot be attributable to Septa because his conduct was personally motivated, not because he was employed by a independent contractor.

As argued by defendants, the Court of Appeals for the Third Circuit has held that a municipality is not liable under § 1983 for violating an individual's civil rights as a result of a municipal policy or practice if one of the municipality's employees is not himself liable under § 1983.[2] See Simmons v. City of Phila., 947 F.2d 1042, 1055-56 (3d Cir. 1991) (citing Williams v.

[2] It is well settled that Septa is treated as a municipality under § 1983. See, e.g., Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 817 (3d Cir. 1991).

Borough West Chester, 891 F.2d 458, 467 (3d Cir. 1989)). Septa and King Paratransit take the position that DeSouza is not liable under § 1983 because he cannot be deemed a state actor. They essentially contend that he is not a state actor because his actions were purely private in nature and not at all in furtherance of his official duties.

Traditionally, acting under color of state law requires that the defendant have exercised power "'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Barna v. City of Perth Amboy, 42 F.3d 809, 815-16 (3d Cir. 1994) (quoting West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941))). Accordingly, acts committed in an official capacity, regardless of whether the complained of conduct furthered the goals of the state or constituted an abuse of official power, are deemed to have occurred under the color of state law. See id. at 816 (citations omitted). To emphasize, it is well settled that when an employee abuses his position, he is nonetheless deemed a state actor. See id.

This standard does not mean that all acts committed by an on-duty state employee constitute state action. See Bonenberger v. Plymouth Township, 132 F.3d 20, 23 (3d Cir. 1997). While generally state employment is sufficient to meet the state action requirement, not all torts constitute state action. See id. For example, "a state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official duties does not act under color of law." Id. (citing Mark v. Borough of Hatboro, 51 F.3d 1137, 1150 (3d Cir. 1995)). At the same time, if an off-duty police officer flashes a badge or otherwise purports to act with official authority, he is generally found to act under color of state law. See id. Thus, the key inquiry is whether the employee in committing the alleged act abused a power

or position granted by the state. See id.

As the following cases suggest, the application of this standard is very factually focused. In Bonenberger, the Court of Appeals determined that a sergeant who made unwanted sexual advances toward a subordinate was a state actor despite the fact that the sergeant had no authority to hire, fire or make any employment decisions regarding the subordinate. 132 F.3d at 22, 23. The fact that the sexual harassment was motivated by personal goals did not prevent the sergeant from being deemed a state actor. In Barna, the Court of Appeals held that off-duty police officers involved in a purely personal dispute while outside their jurisdiction were not state actors even though one officer used a nightstick issued by the state. 42 F.3d at 817-19. Thus, in Barna, the officers' initial contact with the plaintiff was not at all related to their position as state officers. It has been held that an on-duty officer who allegedly assaulted an individual with whom he was involved in a traffic accident was a state actor because he began contact with the individual on the belief that the individual's actions warranted an official investigation. See id. (citing Black v. Stephens, 662 F.2d 181 (3d Cir. 1981)). While the assault was personal in nature, the officer was able to stop the individual because he was an officer of the state.

In the present case, Pokalsky boarded the paratransit vehicle because DeSouza represented himself as a paratransit driver who would take her to her requested destination. He abused his position of power when he allowed her to enter the vehicle and believe that she would be taken home without harm. While his actions may have been personal in nature, they were not unconnected to the execution of his duties. For instance, DeSouza did not approach Pokalsky unsolicited on the street and offer to drive her home because as a paratransit driver he was trained to drive individuals in wheelchairs, and then rape her. Nor did he go to her home while in

uniform or not and rape her. In these scenarios, it would likely be fairly argued that DeSouza was not acting under color of state law because in addition to pursuing purely private motives, DeSouza would have accomplished his crime completely unconnected to his official duties. Here, however, it was in the course of carrying out his official duties as a paratransit driver that he was able to create a situation in which he and Pokalsky were alone and he could control her movements and rape her. In other words, DeSouza was only able to commit the rape by using his authority of state law to cause Pokalsky to board and remain aboard the paratransit vehicle.

Defendants, relying primarily on cases to which this Court is not bound, argue that DeSouza is not a state actor because his conduct was purely private in nature and outside the scope of his employment. They take the position that it is irrelevant that DeSouza was on duty at the time of the rape, and that the rape occurred on a paratransit vehicle because the focus should be on the nature of the conduct. This Court respectfully disagrees. Under the reasoning presented by defendants, the state action requirement would never be met in situations where an on-duty government employee acted outside the bounds of his authority. Such a broad rule runs counter to the law articulated above. This Court concludes that while the rape was personal in nature, it did not occur unattached to the execution of his official duties. For these reasons, I conclude that the amended complaint adequately alleges that DeSouza was a state actor on September 6, 2000, at the time he took control of plaintiff's movements upon her embarkation upon the vehicle and continuing through the events of the assault.

Policy Practice or Custom Theory

It is well established that a § 1983 claim brought against a municipality may not be premised under the theory of respondeat superior. See, e.g., Berg v. County of Allegheny, 219

F.3d 261, 275 (3d Cir. 2000) (per curium), cert denied, 531 U.S. 1072 (2001). Rather, such a suit can only be brought if the plaintiff establishes a violation of rights caused by either a policy or custom of the municipality. See id. A policy is made "when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Id. (alteration in original) (citations omitted). A custom consists of "practices of state officials . . . so permanent and well settled as to virtually constitute law." Id. (citations omitted). Upon identifying a policy or custom, liability can be found by establishing that the policy or custom either facially violates a federal law or the municipality acted with "deliberate indifference as to its known or obvious consequences;" a showing of negligence is insufficient. Berg, 219 F.3d at 276 (citations omitted). A plaintiff must also demonstrate that the policy or custom was the proximate cause of the injuries sustained; accordingly, a plaintiff must show a "plausible nexus" or an "affirmative link" between the policy or custom and the deprivation of rights. Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996).

Count III in the amended complaint alleges that Septa and King Paratransit violated § 1983 because of a constitutionally deficient custom, policy or practice. The amended complaint alleges two such customs, policies or practices. First, plaintiff alleges that defendants have a custom or policy of failing to take any action upon receiving a claims of sexual misconduct regarding a paratransit driver, including, e.g., investigating the matter. (Am. Compl. ¶ 72.) While the only detailed account concerns the amended complaint lodged against DeSouza, (Am. Compl. ¶ 18), plaintiff does, contrary to defendants' contention, allege that a custom or policy exists and does not base liability upon this single incident. Notice pleading does not require

Pokalsky to list each incident, she must only allege that a policy or custom exists. Discovery will reveal whether or not a policy or custom in fact exists. It is also alleged, despite Septa's contention to the contrary, that Septa had notice of the amended complaint of improper sexual contact by DeSouza prior to September 6, 2000. (Id.) At this stage in the litigation, Pokalsky is not required to prove her case; she need only allege a short and plain statement of the claim. A reasonable jury could conclude that defendants' alleged custom or policy of disregarding complaints of sexual misconduct amounted to deliberate indifference of the known or obvious consequence of allowing a driver who has been accused of sexual misconduct to continue to drive without investigating the allegation. See Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 724-25 (3d Cir. 1989). The jury could likewise find a plausible nexus between that failure and the deprivation of the rights of Pokalsky. See id. In considering this motion to dismiss, the proper inquiry is not whether Pokalsky will ultimately prevail, but rather whether she is permitted to offer (and gather) evidence to support her claim. I therefore conclude that Pokalsky has sufficiently plead an unconstitutional policy or custom and will deny the motion of defendants on this issue.

The second alleged custom, policy or practice concerns is that Septa and King Paratransit fail to investigate the criminal history of their drivers.[3] (Am. Compl. ¶ 69.) Pokalsky argues that had such an investigation been conducted, defendants would have learned that DeSouza had been

[3] Plaintiff argues in her brief that deficient hiring encompasses more than a criminal background check. She does not, however, direct this Court to any portion of her amended complaint where she clearly articulates this theory. As explained above, it is the amended complaint which serves as the basis for adjudicating this motion. Thus, this Court will not address the issue of whether plaintiff could sustain a claim under § 1983 for a constitutionally deficient hiring process.

arrested for an alleged rape. Under Pennsylvania law, however, it is well established that employers may consider only a prior conviction and not a prior arrest. See 18 Pa.C.S.A. § 9125 ("Felony and misdemeanor convictions may be considered by the employer.") See also Tilson v. School Dist. of Phila., Civ. A. No. 89-1923, 1990 WL 98932, at *4 (E.D. Pa. July 13, 1990), aff'd, 932 F.2d 961 (3d Cir. 1991) (explaining that by statutory amendment in 1979, effective December 11, 1982, employers are no longer allowed to consider arrests). Thus, the claim cannot be sustained because plaintiff is unable to plead a sufficient nexus between the alleged poor policy and the hiring and continued employment of De Souza.

In summary, I therefore conclude that plaintiff has sufficiently alleged an unconstitutional custom, policy or practice of failing to investigate amended complaints of sexual misconduct by paratransit drivers. Plaintiff may not, however, pursue her claim that defendants have an unconstitutional custom, policy or practice of failing to perform criminal background checks on prospective drivers.

State-Created Danger and Special Relationship Theories

There are two exceptions to the general rule that "a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 195-96, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). The first exception is known as the state-created danger exception and was endorsed by the Court of Appeals for the Third Circuit in Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996). The second exception is known as the special relationship theory and was formally recognized by the Court of Appeals for the Third Circuit in D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1369 (3d Cir. 1992).

While the facts alleged in the amended complaint might serve as the basis to pursue one or both of these theories, neither theory is even mentioned in the amended complaint. Pokalsky vigorously pursues both exceptions in her briefing. As articulated above, a motion to dismiss must be adjudicated on the basis of the allegations made in the actual complaint, not in the briefs. While the federal courts adhere to notice pleading, this lower standard of pleading cannot be deemed met in this case where the amended complaint only pursues the theory of a § 1983 violation based on a constitutionally deficient custom, practice or policy. (Am. Compl. Count III). I must therefore conclude that on this record, plaintiff is not permitted to pursue liability premised on either the state-created danger theory or the special relationship theory.

B. The Americans with Disabilities Act

Pokalsky attempts to assert a cause of action under sections 12132 and 12143 of the ADA. Section 12132 provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." Section 12143 provides:

> It shall be considered discrimination for purposes of section 12132 of this title . . . for a public entity which operates a fixed route system . . . to fail to provide . . . paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

Thus, section 12143 is directed towards providing rides to disabled individuals.

Pokalsky asserts the following with respect to her claim under the ADA: "The failure of Septa and King Paratransit to properly hire, train, supervise, reprimand and terminate their paratransit divers . . . such as to provide comparably safe transportation services, constituted discrimination and evidenced discriminatory intent against their disabled customers, including plaintiff." (Am. Compl. ¶ 84.) Thus, Pokalsky appears to claim that a cause of action exists because Septa and King Paratransit allegedly failed to provide a paratransit transportation system that was comparably *safe* to the fixed route transportation system.

Plaintiff does not bring forth a single case in which a court interpreted section 12132 and 12143 to support such a cause of action. Rather, Pokalsky cites to this Court's ruling in Liberty Resources, Inc. v. Southeastern Pennsylvania Transp. Auth, 155 F. Supp. 2d 242 (E.D. Pa. 2001), which dealt with whether Septa was in violation of the ADA because of the number of rides it provided to disabled patrons. The facts of that case were completely distinguishable and do not support plaintiff's claim. Plaintiff does not direct this Court to any section of the corresponding regulations or any portion of the legislative history which would support her claim. This Court is not persuaded that allegations of a failure to train, supervise, reprimand and terminate drivers constitute a violation under the ADA by allegedly causing a comparably unsafe transportation system. I therefore conclude that the motions of Septa and King Paratransit will be granted on this ground and count IV of the amended complaint will be dismissed.

C. State Tort claims

Pokalsky brings forth the following state tort claims against Septa and King Paratransit: (1) assault and battery, (2) negligence, and (3) intentional infliction of emotional distress. I begin with the motion of Septa to dismiss these counts. Septa seeks refuge under section 2310 of Title

1 of the Pennsylvania Judicial Code ("the Code") which statutorily provides for sovereign immunity for the Commonwealth. See 1 Pa.C.S. § 2310; 42 Pa.C.S. § 8521. Septa clearly qualifies as a Commonwealth party under the Code. See Frazier v. Southeastern Pennsylvania Transp. Auth., 868 F. Supp. 757, 761 (E.D. Pa. 1994) (providing citations); Ross v. Southeastern Pennsylvania Transp. Auth., 714 A.2d 1131, 1133 (Pa. Commw. 1998). The nine exceptions to the general rule of immunity provided for in the Code must arise out of negligent acts, and therefore do not include intentional torts. See 42 Pa.C.S. § 8522; Frazier, 868 F. Supp. at 762 ("a Commonwealth party cannot be held liable for damages arising out of intentional torts."); Adams v. McAllister, 798 F. Supp. 242, 247 (M.D. Pa. 1992), aff'd, 972 F.2d 1330 (3rd Cir. 1992) (granting sovereign immunity for claims of intentional infliction of emotional distress and defamation). I therefore conclude that the motion of Septa will be granted with respect to the claims of intentional acts, namely, assault and battery, as well as intentional infliction of emotional distress, and those portions of Counts V and VII will be dismissed.

Pokalsky argues that her claim for negligence should survive based on the vehicular liability exception enumerated in section 8522, which reads:

> Vehicle liability.--The operation of any motor vehicle in the possession or control of a Commonwealth party. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

The exceptions to governmental immunity are to be strictly construed. See White by Pearsall v. School Dist. of Phila., 553 Pa. 214, 718 A.2d 778, 779 (1998). Consistent with this mandate, the Pennsylvania Supreme Court has held that the term "operation," as used within this exception, means "the placement of a vehicle in motion." Regester v. County of Chester, 797 A.2d 898 (Pa.

2002) (citing Love v.. City of Phila., 518 Pa. 370, 543 A.2d 531 (1988) ("'merely preparing to operate a vehicle, or acts taken at the cessation of operating a vehicle[,] are *not* the same as actually operating that vehicle.'") To illustrate, in White, the court held that a school bus driver's action of attempting to supervise a student who was crossing the street after he had exited the bus did not constitute operation within the meaning of the statute. See White, 718 A.2d at 781. The court so held despite the fact that the driver was expressly responsible for such supervision. See id. ("While it may well be that a school district that transports students assumes an obligation to make reasonable efforts to see those students safely to their destinations, it does not necessarily follow that breach of that duty exposes the school district to liability in tort. Rather, the legislature has determined that, unless the conduct at issue falls within specifically stated exceptions, immunity attaches.").

Applied here, to the extent that plaintiff's claim is premised on the theory of respondeat superior, the rape was an intentional act and therefore is not covered under the vehicular liability exception. Further, the rape did not occur while the paratransit vehicle was in operation. Rather, as asserted in the amended complaint, DeSouza stopped the vehicle in a secluded location and committed the rape. To the extent that plaintiff's claim is premised on Septa's failure to screen drivers and investigate complaints about drivers, such negligent conduct is divorced from the "operation" of a vehicle, and therefore the claim cannot be sustained under the vehicular liability exception to governmental immunity. I therefore conclude that the motion of Septa to dismiss the claim asserted against it for negligence will be granted and that portion of Count VI will be dismissed.

I now turn to the motion of King Paratransit. King Paratransit contends that because the

amended complaint alleges that King Paratransit was under contract to perform a governmental function and that King Paratransit was therefore acting under color of state law, King Paratransit should be protected under sovereign immunity. King Paratransit does not deny that it is an independent contractor. Defendant brings forth no case in support of its position. Pokalsky argues that as an independent contractor, King Paratransit cannot claim governmental immunity.

Pennsylvania's State Tort Claim Act defines "Commonwealth party" as "A Commonwealth agency and any employee thereof. . . " 42 Pa.C.S.A. § 8501. "Commonwealth agency" is statutorily defined as "[a]ny executive agency or independent agency." 42 Pa.C.S.A. § 102. Agencies are considered "executive" if they are under the supervision and control of the Governor; they are considered independent if they are not executive. See Marshall v. Port Auth. of Allegheny County, 524 Pa. 1, 5, 568 A.2d 931, 933 (1990) (citing 42 Pa.C.S.A. § 102). The Pennsylvania Supreme Court has determined that under the Commonwealth's statutory scheme, "independent contractors . . . performing work for Commonwealth agencies are not employees of the agencies, and, thus, do not constitute Commonwealth parties." Id. at 9, 568 A.2d at 935. See also Helsel v. Complete Care Serv., 797 A.2d 1051, 1058 n.5 (Pa. Commw. 2002).

King Paratransit acknowledges Marshall, but argues that because the amended complaint alleges that King Paratransit is a state actor for § 1983 purposes, King Paratransit is entitled to sovereign immunity for the state tort actions asserted against it. This Court respectfully disagrees. The Pennsylvania Supreme Court has made it clear that under Pennsylvania statutory law, an independent contractor is not protected by sovereign immunity. To be clear, this determination is rooted in the High Court's construction of a specific *state statute*. The inquiry for determining whether a private party is a state actor under *§ 1983* is quite different. The Court

of Appeals for the Third Circuit has recognized three distinct tests to determine whether there has been state action in the context of § 1983: (1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state; (2) whether the private entity has acted with the help of or in concert with state officials; and (3) whether a symbiotic relationship exists between the private entity and the state. See Mark v. Borough of Hatboro, 51 F.3d 1137, 1142 (3d Cir. 1995) (citations omitted). Thus, the inquiry under the Tort Claim Act is governed by a party's standing as an independent contractor, while the inquiry under § 1983 requires a more complex analysis and allows for an independent contractor to be deemed a state actor.

Concluding that King Paratransit is not protected under the Tort Claims Act is consistent with the purpose of the Act which is to limit government liability to preserve the public treasury. See Sphere Drake Ins. Co. v. Philadelphia Gas Works, 566 Pa. 541, 548 782 A.2d 510, 515. (2001). Here, the parties have stipulated that King Paratransit is privately insured. (Order and Stipulation of June 7, 2002, Document Nos. 20 and 21). I therefore conclude that King Paratransit is not entitled to sovereign immunity and will deny the motion on this ground.

King Paratransit also argues that it may not be held liable for the intentional torts asserted against it because these claims are premised on the theory that King Paratransit is vicariously liability for the criminal conduct of DeSouza. Count V asserts a claim of vicarious liability for the assault and battery committed by DeSouza, and Count VII asserts a claim of vicarious liability for the intentional infliction of emotional distress committed by DeSouza.

The Pennsylvania Superior Court has consistently ruled that an employer may be held liable for the intentional or criminal acts of its employee only if the wrongful act was committed within the scope of the employment. Fala v. Perrier Group of Am., No. 99-CV-3319, 2000 WL

688175, at *13 (E.D. Pa. May 25, 2000); Dee v. Marriott Int'l, Inc., No. Civ. A. 99-2459, 1999 WL 975125, at *3 (E.D. Pa. Oct. 6, 1999); Barry ex rel. Cornell v. Manor Care, Inc., No. Civ. A. 97-5883, 1999 WL 257663, at *3 (E.D. Pa. Apr. 29, 1999); Brezenski v. World Truck Transfer Inc., 755 A.2d 36, 39 (Pa. Super. 2000); R.A. ex rel. N.A. v. First Church of Christ, 748 A.2d 692, 699 (Pa. Super. 2000); Costa v. Roxborough Mem'l Hosp., 708 A.2d 490, 493 (Pa. Super 1998). These courts have also agreed that where an employee commits an intentional wrongful act upon another for purely personal reasons or in an outrageous manner, the employee is not acting within the scope of his employment, and the employer is therefore not liable for these actions. See Fala, 2000 WL 688175, at *13; Dee, 1999 WL 975125, at *3; Barry, 1999 WL 257663, at *3;Brezenski 755 A.2d at 39; First Church of Christ, 748 A.2d at 700; Costa, 708 A.2d at 493. Likewise, where the employee acts with force "which is excessive and so dangerous as to be totally without responsibility or reason, the employer is not responsible as a matter of law." E.g., Costa, 708 A.2d at 493.

In the amended complaint before this Court, it is clear that DeSouza's rape of Pokalsky was committed for personal reasons and was an absolutely outrageous act of devious and excessive force. Plaintiff responds to defendant's argument by bringing forth cases which address whether an employer can be sued for *negligence* in failing to control or supervise an employee. See Dempsey v. Walso Bureau, Inc., 431 Pa. 562, 246 A.2d 418 (1968); Krasevic v. Goodwill Indus. of Central Pa. Inc., 764 A.2d 561 (Pa. Super. 2000). These cases, however, do not address vicarious liability for intentional or criminal acts committed by an employee. Rather, they tend to support Count VI of the amended complaint which asserts a cause of action for negligence against King Paratransit. Thus, plaintiff misinterprets King Paratransit's argument. I

therefore conclude that King Paratransit cannot be held liable under the theory of respondeat superior for the intentional torts committed by DeSouza. I will therefore grant the motion of King Paratransit on this ground and will dismiss those portions of Counts V and VII.

I observe, however, that Count VII also asserts a cause of action for King Paratransit's own alleged intentional infliction of emotional distress; yet, King Paratransit does not specifically move to dismiss these allegations.[4] (Am. Compl. ¶¶ 97-98.) This Court will not *sua sponte* discuss the merits of this claim and therefore this claim will survive this motion to dismiss.

D. DeSouza criminal allegations

DeSouza responded to plaintiff's amended complaint by filing a "CrossClaim," which includes a request for criminal charges to be asserted against Pokalsky among others, (Document No. 17). Plaintiff moved to dismiss DeSouza's pleading, and DeSouza responded by serving the parties with an "Amended Counter Suit," which DeSouza did not file with this Court. This Court treated the Amended Countersuit as filed, and as mooting plaintiff's first motion to dismiss, (Document No. 28). Pokalsky filed a second motion to dismiss and strike the amended pleading, (Document No. 26), which is presently before the court. DeSouza has since withdrawn his asserted civil claims, but still wishes to proceed with the criminal charges, (Document Nos. 29 and 30). DeSouza, as a private citizen, is without authority to prosecute the requested criminal charges. See In re Guyer, No. Civ. A. 96-7935, 1996 WL 689376, at *1 (E.D. Pa. Nov. 27,

[4] The final paragraph of Count V provides: "Defendants . . . are also liable for the conduct of DeSouza under the principal of respondeat superior." (Am. Compl. ¶ 91.) The language of the paragraph suggests that the claim for assault and battery is premised on another theory as well; however, the amended complaint does not provide for any other theory upon which this claim is asserted.

1996); United States v. Leomporra, No. Civ. A. 95-6134, 1995 WL 605494, at *1 (E.D. Pa. Oct. 16, 1995); Figueroa v. Clark, 810 F. Supp. 613, 615 (E.D. Pa. 1992); Bryant v. City of Phila., Civ. A. No. 89-6005, 1990 WL 82099, at *6 n.1 (E.D. Pa. June 11, 1990); Comer v. Philadelphia County, Civ. A. No. 86-3967, 1987 WL 7688, at *4 (E.D. Pa. Mar. 10, 1987); United States ex rel. Savage v. Arnold, 403 F. Supp. 172, 174 (E.D. Pa. 1975); United States v. Panza, 381 F. Supp. 1133, 1134 (W.D. Pa. 1974). Accordingly, the motion of plaintiff will be granted and the countersuit dismissed.

IV. Conclusion

For the reasons stated herein, pursuant to Federal Rule of Civil Procedure 12(b)(6), the motions of Septa and King Paratransit to dismiss will be granted in part and denied in part. Accordingly, Count III of the amended complaint will be sustained to the extent that it pleads a § 1983 claim premised on the alleged unconstitutional policy or custom of defendants to fail to take any action upon receiving a claims of sexual misconduct regarding a paratransit driver. Count IV of the amended complaint will be dismissed in its entirety. Count V will be dismissed to the extent that it is asserted against Septa and King Paratransit. Count VI of the amended complaint will be dismissed as to any claim asserted against Septa, but not as to any claim asserted against King Paratransit. Count VII of the amended complaint will be dismissed as to the claim asserted against Septa and the vicarious liability claim asserted against King Paratransit. In addition, as discussed herein, the amended complaint does not state a claim under either the state created danger theory or the special relationship theory. The motion of plaintiff to strike the private criminal charges asserted by DeSouza will also be granted pursuant to Federal Rule of Civil Procedure 12(f).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISA POKALSKY	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
et al.	:	
Defendants.	:	**NO. 02-323**

ORDER

AND NOW, this 28th day of August, 2002, upon consideration of the motion of defendant Southeastern Pennsylvania Transportation System ("Septa") to dismiss (Document No. 18) and the motion of King Paratransit Services, Inc. ("King Paratransit") to dismiss (Document No. 19), both of which have been filed pursuant to Federal Rule of Civil Procedure 12(b)(6), and upon consideration of the motion of plaintiff Lisa Pokalsky ("Pokalsky") to strike the federal criminal charges alleged by *pro se* defendant David DeSouza (Document No. 26), which has been filed pursuant to Federal Rule of Civil Procedure 12(f), and upon consideration of the responses and replies thereto, and for the reasons provided in the foregoing memorandum, it is hereby **ORDERED** that:

1. The motions of Septa and King Paratransit are **GRANTED** in part and **DENIED** in part:

    a. It is **DECLARED** that Count III of the amended complaint adequately pleads a § 1983 claim premised on the alleged unconstitutional policy or custom of defendants to fail to take any action upon receiving a claims of sexual misconduct regarding a paratransit driver. It is further **DECLARED** that Count III of the amended complaint fails to state a claim under either the state created danger theory or the special relationship theory.

b. Count IV of the amended complaint is **DISMISSED** in its entirety.

c. Count V is **DISMISSED** to the extent that it is asserted against Septa and King Paratransit.

d. Count VI of the amended complaint is **DISMISSED** as to any claim asserted against Septa, but not as to any claim asserted against King Paratransit.

e. Count VII of the amended complaint is **DISMISSED** as to the claim asserted against Septa and the vicarious liability claim asserted against King Paratransit.

2. The motion of Pokalsky to strike is **GRANTED** and the amended countersuit by David De Souza is dismissed.

IT IS FURTHER ORDERED that defendants Septa and King Paratransit shall answer the amended complaint no later than September 23, 2002.

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LOWELL A. REED, JR., S.J.